U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 14 March 2006

Case No.: 2002-BLA-0166

BRB No.: 04-0625 BLA

In the Matter of

CHARLES TIPTON
Claimant

v.

WOLFE CREEK COLLIERIES
Employer

ZEIGLER COLA HOLDING COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES (On brief):

Stephen A. Sanders, Esq.
For the claimant

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER ON REMAND —DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits under the Act are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment.
20 C.F.R. § 718.201 (1996).

On April 6, 2004, a Decision and Order on Remand was issued denying benefits to Claimant. He then appealed to the Benefits Review Board, who on February 28, 2005, vacated the findings under Section 718.202(a)(4) and remanded the claim for reconsideration of the relevant medical evidence of record. *Tipton v. Wolfe Creek Colliers*, BRB No. 04-0625 BLA (February 28, 2005)(unpub.).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, Claimant, and Employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

Procedural History

Claimant filed his application for benefits on January 20, 1998. (DX 1). The District Director denied his claim on May 4, 1998. (DX 12). Then on April 27, 1999, Claimant filed an application for modification and submitted new medical evidence. (DX 18). On February 16, 2001, the District Director denied his request for modification. (DX 13-15). Claimant filed a motion for reconsideration but it was also denied. (DX 16, 19). Claimant then requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges. (DX 20). A Decision and Order Denying Benefits was issued on August 21, 2002. Claimant appealed to the Benefits Review Board, who vacated and remanded the decision on July 25, 2003. A Decision on Remand was then issued on April 6, 2004 denying benefits. Claimant appealed again to the Benefits Review Board who issued another decision vacating and remanding the denial of benefits. I now address that decision.

Issues on Remand

The issues on remand are as follows:

1. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

2. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

3. Whether Claimant is totally disabled; and

4. Whether Claimant's total disability, if present, is due to pneumoconiosis.

Medical Evidence

In my previous Decision and Order I completely and thoroughly summarized all the medical evidence of record. I will not disturb the descriptions of the evidence and will refer to it as necessary to resolve the entitlement issues. Accordingly, I incorporate by reference, as if fully set forth herein, the description of the medical evidence as contained in my April 6, 2004 Decision and Order.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Modification

Section 725.310 provides that a claimant, employer, or the district director may file a petition for modification within one year of the filing of the last denial of benefits. Modification petitions may be based upon a change in condition or a mistake in a determination of fact. 20 C.F.R. § 725.310(a). New evidence, however, is not a prerequisite to modification based upon a mistake of fact. *Nataloni*, 17 BLR at 1-84; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158(1990), *aff'd on recon.* 16 BLR 1-71, 1-73 (1992). Rather, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

Claimant requests that the Court review the previous denial of the District Director. "[W]here a claimant seeks modification of a denial of benefits by the district director, the administrative law judge shall conduct a *de novo* hearing on the merits of entitlement instead of making a preliminary determination regarding the grounds for modification." *Tipton v. Wolfe Creek Collieries*, BRB No. 02-0863 BLA (July 25, 2003) (unpub.) *citing Motichak v. Beth Energy Mines, Inc*., 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Therefore, I considered all the evidence of record when formulating my decision.

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The

regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

As indicated in my prior decision, the chest x-rays of record do not support a finding of pneumoconiosis. I stand by my previous findings which the Board affirmed. *Tipton*, BRB No. 04-0625, p. 4. Therefore, pneumoconiosis has not been established under § 781.202(a)(1).

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, not withstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*).

There are ten physicians providing medical opinions on pneumoconiosis in the record. In my April 6, 2004 Decision and Order I made credibility findings regarding seven of these

physicians. All of these findings were affirmed by the Board except for the analysis of Dr. Clarke's opinion. I stand by my previous credibility findings regarding the pneumoconiosis opinions of Drs. Wells, Sundaram, Dahhan, Jarboe, Hippensteel, Wright and Castle, and will not discuss my findings on their credibility in this decision. However, I have included an analysis of Dr. Clarke's opinion, and the opinions of Drs. Rasmussen and Burki who were not included in my prior decision.

D.L. Rasmussen, M.D. opined Claimant has pneumoconiosis. (DX 39). However, Dr. Rasmussen based his opinion solely upon readings of a chest x-ray and Claimant's history of dust exposure. In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray... and not a reasoned medical opinion." *Id*.

Acknowledging that Dr. Rasmussen performed other physical and objective testing, he noted that he relied on Claimant's positive chest x-ray and coal dust exposure for his pneumoconiosis diagnosis. (DX 39). Moreover, he failed to state how the results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As Dr. Rasmussen does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the chest x-ray and exposure history, I find his report with respect to a diagnosis of pneumoconiosis is unreasoned and I afford it little weight.

William F. Clarke, M.D. examined Claimant on February 27, 1996. (DX 8). He diagnosed Claimant with pneumoconiosis, restrictive pulmonary disease and severe chronic obstructive airway disease. He based his opinion on the chest x-ray evidence, pulmonary function testing and coal mine employment. Dr. Clarke opined that Claimant's conditions are all related to coal dust exposure. Stopping there, Dr. Clarke's opinion seems well-reasoned and well-documented; however, there are problems with his report. First, N.K. Burki, M.D., Board-certified in Internal Medicine with a Subspecialty in Pulmonary Diseases, invalidated Dr. Clarke's pulmonary function study. (DX 8). Dr. Burki invalidated the study on the grounds that the curve shape indicated suboptimal effort. Dr. Clarke had determined Claimant had good cooperation and effort during the testing. The record does not contain the qualifications of Dr. Clarke and therefore, the evidence shows Dr. Burki is a more qualified physician. I grant less weight to the part of Dr. Clarke's report where he bases his opinion on the pulmonary function test. Also, while Dr. Clarke acknowledged that Claimant has a significant smoking history, he never discusses how it could have attributed to Claimant's condition and consistently states there is no other etiology for Claimant's condition except coal dust exposure. (DX 8). Therefore, I

afford less weight to Dr. Clarke's report due to his failure to take into consideration and discuss the possible effects of Claimant's smoking history.

In contrast, N.K. Burki, M.D., Board-certified in Internal Medicine with a Subspecialty in Pulmonary Diseases, concluded Claimant does not have pneumoconiosis. (DX 48). Dr. Burki was asked by the District Director to issue a consultative report answering questions regarding Claimant's condition. However, the report fails to state the medical evidence reviewed by Dr. Burki. He stated that based on the chest x-ray evidence he reviewed, Claimant does not suffer from pneumoconiosis. He acknowledges the September 14, 1996, January, 15, 2000 and July 26, 2000 chest x-ray films in his reasoning. He also found Claimant suffered from no pulmonary impairment based on the other objective testing he reviewed. (DX 48). Although Dr. Burki's opinion is supported by the probative negative chest x-ray evidence of record, I still give his opinion little weight. I am unable to determine what he actually relied upon or took into consideration when formulating his opinion.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray reports and the more complete, comprehensive and better supported medical opinion reports of Drs. Dahhan, Castle and Jarboe, as well as the less influential opinions of Drs. Hippensteel, Wright and Burki, outweigh the less influential opinion of Dr. Clarke, the unreasoned/undocumented reports of Drs. Wells, Sundaram and Rasmussen, and the other contrary evidence of record. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-

pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[1] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). However, a non-conforming study may be entitled to probative weight where the results are non-qualifying. The Board has stated that a report's lack of cooperation and comprehension statements does not lessen the reliability of the study when it is non-qualifying. *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983).

In the pulmonary function tests of record, there is a small discrepancy in the height attributed to Claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, 69.5 inches.

[1]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

The pulmonary function tests of record are summarized in my April 6, 2004 Decision and Order. There are eight pulmonary function tests in evidence and of those only two produced qualifying results. The tests conducted by Drs. Wells and Clarke were qualifying. (DX 7, 8). However, both tests are unreliable. First, the test administered by Dr. Wells fails to identify the cooperation and effort level of Claimant, and as stated above, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, Houchin*, 6 B.L.R. 1-1141. Also Dr. Burki invalidated the study performed by Dr. Wells. He found the testing equipment failed to meet specifications, the study was improperly performed and the volume/time tracings were illegible. (DX 7). Dr. Burki also invalidated the test performed by Dr. Clarke, finding Claimant used less then optimal effort, cooperation and comprehension. (DX 8). Dr. Burki based his opinion on the shape of the curve, stating it indicated suboptimal effort. Dr. Burki is Board-certified in Internal Medicine with a Subspecialty in Pulmonary Diseases. The record does not include the qualifications of Drs. Wells and Clarke. Therefore, I give the pulmonary function testing performed by Drs. Wells and Clarke little weight.

The pulmonary function testing performed by Drs. Wright and Rasmussen also failed to state the cooperation and effort levels of Claimant.[2] (DX 35, 18, 39). However, these studies produced non-qualifying results and a non-conforming study may be entitled to probative weight where the results are non-qualifying. *Crapp*, 6 B.L.R. 1-476.

Accordingly, I find per Section 178.204(b)(2)(i), Claimant has failed to establish total disability.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

There are five arterial blood gas studies of record. (DX 9, 34, 35, 39, 47). However, the study at exercise performed by Dr. Rasmussen is the only study producing qualifying results. Accordingly, I find Claimant has not proven total disability by a preponderance of the evidence under Section 718.204(b)(2)(ii).

[2] Director's Exhibit 18 is a pulmonary function study performed by an unknown physician. The study also fails to state the cooperation and effort levels of Claimant. However, since the study was never confirmed by a physician and it was invalidated by Dr. Dahhan, I give the study no weight.

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are summarized in my April 6, 2004 Decision and Order. In summary, Gregory D. Wells, M.D. examined Claimant on October 11, 1994. (DX 7). He performed an employment history upon Claimant finding he worked in underground coal mine employment for twenty years. Dr. Wells opined Claimant has severe restrictive lung disease. He stated that from a pulmonary standpoint Claimant is unable to perform his regular coal mine employment or comparable employment in a dust free environment. Dr. Wells explained his opinion stating "[a]ny further exposure to dust will cause further compromise to the patient's respiratory system." He provided no other basis for his total disability opinion. An opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not the equivalent of a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.,* 12 BLR 1-83 (1988). Furthermore, the opinon of Dr. Wells is not supported by the objective medical testing of record. The pulmonary function test performed by Dr. Wells was invalidated by Dr. Burki, a higher qualified physician.[3] (DX 7). As such, I assign little weight to Dr. Wells' finding of total disability.

Dr. Clarke noted Claimant had twenty-one years of underground coal mine experience. (DX 8). He found that Claimant is totally disabled due to pneumoconiosis. He states that he

[3] The qualifications of Dr. Wells are not in the record.

cannot find any other etiology for this disability. Dr. Clarke notes that based on the entire examination, Claimant is totally disabled. He states that his training and experience gives him the expertise to estimate Claimant's disability. However, Dr. Clarke's qualifications are not within the record. He relied on pulmonary function testing in formulating his opinion; however, Dr. Burki invalidated the test finding as less than optimal effort on the part of Claimant. (DX 8). Since Dr. Clarke's qualifications are not within the record, I find Dr. Burki a higher qualified physician, and as discussed above, I grant little weight to the pulmonary function test performed by Dr. Clarke. Furthermore, Dr. Clarke's opinion is not supported by the other objective testing of record. Accordingly, I grant little weight to his opinion.

In contrast, Thomas M. Jarboe, M.D. opines Claimant does not have a pulmonary or respiratory impairment. (DX 34). He states there is no evidence of a disabling respiratory impairment. He bases his opinion on the pulmonary function tests and arterial blood gas studies of record. Dr. Jarboe noted Claimant worked twenty-one years in coal mine employment. He found from a pulmonary standpoint Claimant could perform his regular coal mine employment. (DX 34). Dr. Jarboe's opinion is consistent with the probative objective testing of record. I find Dr. Jarboe's medical report is well-reasoned and well-documented regarding total disability.

Ballard D. Wright, M.D., examined Claimant on September 14, 1996. (DX 35). He performed an employment history upon Claimant finding he worked twenty-one years in underground coal mine employment. Dr. Wright opines that Claimant has no pulmonary impairment or any lung abnormalities. He based his opinion on the examination of Claimant's lungs. He states that Claimant can perform his regular coal mine employment or comparable employment in a dust-free environment. (DX 35). Dr. Wright's opinion is supported by the objective medical evidence in the record. Therefore, Dr. Wright's diagnosis regarding total disability is well-reasoned and well-documented and I afford it great weight.

Raghu R. Sundaram, M.D. provided an opinion stating Claimant has a class II impairment. (DX 39). He examined Claimant on February 17, 1998. Dr. Sundaram states Claimant is between ten and twenty-five percent impaired due to coal mine employment. However, Dr. Sundaram failed to opine whether Claimant could perform his regular coal mine employment or comparable employment in a dust-free environment. (DX 39). I find he has failed to make a finding of total disability. *See Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984). Accordingly, I grant no weight to Dr. Sundaram's opinion regarding total disability.

Dr. Rasmussen examined Claimant on May 6, 1999. (DX 39). He recorded an employment history of twenty-one years in underground coal mine employment. Dr. Rasmussen performed a physical examination, pulmonary function tests and arterial blood gas studies on Claimant. He stated that the objective studies revealed at least a moderately severe loss of respiratory function as reflected by impairment in oxygen transfer and hypoxia during exercise. Dr. Rasmussen noted that this impairment renders Claimant totally disabled from coal mine employment involving heavy manual labor. Although the pulmonary function studies did not produce qualifying values, the arterial blood gas studies were qualifying for total disability. (DX 39). Therefore, I find Dr. Rasmussen's opinion regarding total disability well-reasoned and well-documented and afford it probative weight.

A medical opinion does not have to be wholly reliable or wholly unreliable; rather, the opinion can be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. *See Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994); *Billings v. Harlan #4 Coal Co.*, B.R.B. No. 94-3721 B.L.A. (June 19, 1997) (*en banc) (*unpub.). Accordingly, I divide Dr. Rasmussen's opinions into the relevant issues of pneumoconiosis and total disability. (DX 39). As noted above with respect to pneumoconiosis, Dr. Rasmussen's report is not well-reasoned. However, in examining the second issue of total disability, I find Dr. Rasmussen's opinion well-reasoned and well-documented.

The District Director asked N.K. Burki, M.D., who is Board-certified in Internal Medicine with a Subspecialty in Pulmonary Diseases, to perform a consultative report. (DX 48). Dr. Burki opined that Claimant does not have a pulmonary impairment. He based his decision on pulmonary function testing. Dr. Burki then opines that Claimant retains the capacity to perform his regular coal mine employment. The report does not indicate the medical evidence examined by Dr. Burki. However, he does note the November 15, 2000 testing. He states the arterial blood gas studies and spirometry values were normal. Although the objective testing supports Dr. Burki's opinion, since I am unable to determine exactly what he took into consideration when formulating his opinion, I grant his opinion little weight.

Abul Dahhan, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on November 15, 2000. (DX 47). He also reviewed the medical evidence of record. Dr. Dahhan documented that Claimant has twenty-one years of coal mine employment. He performed pulmonary function and arterial blood gas studies on Claimant. He found no evidence of a total or permanent pulmonary disability and stated Claimant retains the capacity to continue his last coal mine employment or comparable work in a dust-free environment. Dr. Dahhan's opinion is supported by the objective medical testing of record. (DX 47). I find Dr. Dahhan's medical report is well-reasoned and well-documented regarding total disability.

James R. Castle, Board-certified in Internal Medicine and Pulmonary Diseases, provided a consultative report on November 28, 2000. He took into consideration the medical evidence of record. He found no evidence of a pulmonary restriction. Dr. Castle stated Claimant has a mild respiratory impairment. However, he opined Claimant could not return to his usual coal mine employment based upon his hypoxemia which prevents him from being able to perform heavy manual labor. He based his decision on the arterial blood gas studies. Dr. Castle attributed Claimant's disability to tobacco use and not coal mine employment. The probative objective medical testing of record does not support his opinion. He also failed to explain why he gave more weight to the one qualifying arterial blood gas study instead of the four non-qualifying studies. Furthermore, the opinions of non-examining physicians may permissibly be accorded less weight than the opinions of examining physicians if they are also found to be less probative for other reasons as discussed above. Therefore, although I afforded probative weight to Dr. Castle's pneumoconiosis opinion, I afford less weight to Dr. Castle's total disability opinion. *See Drummond Coal Co.*, 17 F.3d 361; *Billings*, B.R.B. No. 94-3721 B.L.A.

Kirk E. Hippensteel, M.D., Board-certified in Internal Medicine with a Subspecialty in Pulmonary Diseases, also provided a consultative report on Claimant's condition. (DX 45). Dr. Hippensteel took into consideration all the medical evidence of record. He opines that Claimant has no pulmonary impairment from coal dust exposure. Dr. Hippensteel states that Claimant retains the pulmonary capacity to perform his regular coal mine employment and it is his non-pulmonary problems that made him stop working in the mines. The objective medical testing of record supports Dr. Hippensteel's findings. I find his medical report well-reasoned and well-documented regarding total disability, despite the fact that I found his pneumoconiosis opinion unreasoned. *See Drummond Coal Co.*, 17 F.3d 361; *Billings*, B.R.B. No. 94-3721 B.L.A. I divide his opinion into the two relevant sections and grant the sections differing weights.

I have considered all the medical reports and I find the more complete, comprehensive and better supported medical opinion reports of Drs. Jarboe, Wright, Dahhan and Hippensteel outweigh the less probative reports of Drs. Wells, Clarke and Sundaram. Although the reports of Drs. Rasmussen and Castle were granted weight on the issue of total disability, Claimant has not established total disability by the preponderance of the medical opinion reports of record. Thus Claimant has not established total disability under the provisions of Section 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

Since I have found Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.

ENTITLEMENT

Based on the findings in this case, Claimant has not met the conditions of entitlement. Claimant has not established the presence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment or that he is totally disabled. Therefore, Mr. Tipton's claim for benefits under the Act shall be denied.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

ORDER

It is ordered that the claim of Charles Tipton for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).